

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ARMANDO FLORES,

Defendant and Appellant.

E053844

(Super.Ct.No. RIF10002100)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge.

Affirmed.

Law Office of Zulu Ali, Zulu Ali and Maleha Khan-Avila for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Randall D. Einhorn, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

This case arises from defendant Jose Armando Flores shooting Christopher Hyde in the foot while Hyde was walking to Ranch Market in Riverside. Evidence was presented at trial that defendant shot Hyde because defendant believed Hyde was a member of a rival gang and had shot at defendant two weeks earlier.

Defendant appeals from judgment entered following jury convictions for attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 664¹; count 1), battery with serious bodily injury (§ 243, subd. (d); count 2), and street terrorism (§ 186.22, subd. (a); count 3). The jury also found true as to count 1, enhancement allegations that defendant personally discharged a firearm (§ 12022.53, subd. (c)) and caused great bodily injury (§ 12022.53, subd. (d)). The jury found true as to count 2, the allegation that defendant personally used a handgun (§ 12022.5, subd. (a)). The trial court sentenced defendant to 32 years to life in state prison.

Defendant challenges denial of his motions in limine to exclude (1) identification evidence, (2) incriminating statements defendant made while in custody, and (3) testimony by an acquaintance of the victim, who observed defendant shortly before the shooting. Defendant also contends the trial court abused its discretion in denying his motion in limine to bifurcate the street terrorism charge and exclude gang evidence. Defendant further argues the prosecutor committed several instances of misconduct

¹ Unless otherwise noted, all statutory references are to the Penal Code.

during closing argument and rebuttal, and that the cumulative effect of all of these errors requires reversal. Defendant contends there was insufficient evidence to support his convictions for attempted premeditated murder, battery, and street terrorism, and the trial court erred in denying his motion for new trial, based on prosecutorial misconduct and insufficient evidence. We reject defendant's contentions, as discussed below, and affirm the judgment.

II

FACTS

On April 14, 2010, defendant, his friend, David Quintero, Quintero's girlfriend, Kimberly Guerrero, and another girl, went to Ranch Market. Defendant was wearing a Raiders jersey. Guerrero drove the group in a silver car to the market. Quintero and defendant went inside the market, bought a shirt, and then went back outside and talked to each other in the parking lot for a few minutes before getting back in the car and driving away.

While defendant and Quintero were still in the Ranch Market parking lot, Alfred Madril and his girlfriend arrived around 7:35 p.m. Madril noticed two Hispanic men standing in front of a silver car, speaking to two females in the car. One of the men (defendant) was of a heavy build and wearing a Raiders jersey. The other man (Quintero) was shorter and thin. Defendant and Quintero looked at Madril in a threatening, intimidating way. After Madril entered the market, defendant entered. Madril left a few minutes later. About 30 minutes later, Hyde's girlfriend called Madril and told him Hyde had been shot. Hyde was a friend and employee of Madril.

Quintero testified that, after he and defendant left Ranch Market in Guerrero's car, defendant saw Hyde walking down the street and Quintero yelled at Guerrero to stop the car. Guerrero refused. While the car was moving, but slowing down, defendant and Quintero got out of the car and quickly walked toward Hyde. Defendant yelled, "hey," to Hyde. Hyde looked at defendant and Quintero, and then turned and ran away. Defendant pulled out a .22-semiautomatic gun, cocked it, aimed at Hyde with a two-handed grip, and fired three shots at Hyde. One shot hit Hyde in the foot. Hyde's shoe flew off. By the time Guerrero had made a U-turn, defendant and Quintero had returned to the car. Guerrero testified that the men seemed in a panic when they got back in the car and told her to drive away. Later, Quintero told Detective Collopy that defendant had told him defendant shot Hyde because defendant thought Hyde had previously shot at defendant.

Hyde testified that, as he was walking down the street, he heard a car door slam and saw defendant jogging toward him, while raising a gun and aiming at him. Hyde ran away as defendant fired at him and hit Hyde's foot. Defendant fired two more shots, which did not hit Hyde. Hyde looked back as he was running and noticed a trail of blood from his foot wound. Hyde ran to a friend's house and reported the shooting to the police. He described the shooter as wearing a Raiders jersey. Hyde received treatment for the bullet wound at the hospital. The bullet had traversed through his foot.

Right after Madril heard Hyde had been shot, he went to the hospital. Before arriving, Madril spoke to Hyde on the phone. Hyde described the men who had shot him. Upon hearing that one of the men was wearing a white Raiders jersey, Madril told Hyde that he had seen two Hispanic men at Ranch Market who fit the description of the men

Hyde had just described. Madril noted that one of the men was wearing a white Raiders jersey.

Based on Madril's description of the two men he had seen at the market and Hyde's description of the suspects, the police obtained a surveillance tape from Ranch Market showing defendant and Quintero at the market at about the time Madril was there. From the surveillance tape, the police put together a photographic lineup. Hyde identified defendant as the shooter and Quintero as defendant's companion.

The police searched defendant's home and recovered an empty gun case under defendant's bed. The case was for a .22-caliber handgun and had a magazine clip for a .22-caliber gun and live .22-caliber ammunition. The gun was not recovered. After defendant was arrested, he was shown the Ranch Market surveillance video. Defendant pointed himself out in the video.

According to Detective Collopy, who testified as a gang expert, defendant and Quintero were active members of the Hillside Rivas gang. Collopy noted that, before defendant's trial, while defendant was in custody, defendant received letters from fellow gang members. Collopy also testified that the shooting occurred in defendant's gang's territory and was committed for the benefit of his gang.

III

IDENTIFICATION OF DEFENDANT

Defendant contends the trial court abused its discretion in denying his motion in limine to exclude evidence of Hyde's identification of defendant. Defendant asserts that his constitutional right to due process was violated when the trial court admitted evidence

of both Hyde's out-of-court and in-court identifications of defendant. Defendant argues the out-of-court identification procedures were unduly suggestive and therefore Hyde's identification of defendant was unreliable. We reject this contention. Defendant did not provide any evidence that improper or suggestive identification procedures were used during the identification process.

In determining whether the identification evidence violates a defendant's due process rights, "we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Kennedy* (2005) 36 Cal.4th 595, 608; *People v. Cunningham* (2001) 25 Cal.4th 926, 989; see also *Manson v. Brathwaite* (1977) 432 U.S. 98, 114.)

As to the first prong, the standard used to determine if a procedure is unduly suggestive, is "whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." [Citation.] (*People v. Yeoman* (2003) 31 Cal.4th 93, 124; *People v. Cunningham, supra*, 25 Cal.4th at p. 990.) Any evidence of suggestiveness in the identification process goes to the weight rather than the admissibility of identification evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 369.)

The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.) When reviewing the trial court's ruling on defendant's motion in limine to suppress identification evidence, we defer to the trial court's factual findings if they are supported by substantial evidence, but independently review the application of the law to those facts. (*People v. Kennedy, supra*, 36 Cal.4th at p. 608.)

Defendant argued in his motion in limine that the identification procedures were unduly suggestive and unreliable because Hyde was shown the surveillance camera photograph of defendant and two others on April 16, 2010, and then the photo lineup on April 28, 2010, after Madril had suggested to Hyde that the three individuals he had seen in the market were involved in the shooting. But defendant failed to present sufficient evidence, establishing that the identification procedures were unduly suggestive or that the identification itself was unreliable under the totality of the circumstances. (*People v. Kennedy, supra*, 36 Cal.4th at p. 608.)

Furthermore, testimony presented at trial established that Hyde's identification of defendant was reliable and not merely the product of Madril suggesting to Hyde defendant might be the perpetrator. There was substantial evidence that (1) Hyde had an opportunity to view defendant, (2) Hyde's attention was focused to a significant degree on defendant when Hyde came in contact with defendant, (3) Hyde's initial description of defendant to the police and to Madril was relatively accurate regarding defendant's clothing, (4) Hyde was somewhat uncertain as to his identification of defendant, but this was partly because an acquaintance, who was not present during the shooting, told him he

was wrong, and (5) the lapse of time between the offense on April 14, 2010, and Hyde's identification of defendant on April 16, 2010, was relatively short. Independently applying the law to the court's factual findings, we find no abuse of discretion in the trial court allowing evidence of Hyde's identification of defendant as the perpetrator.

IV

WAIVER OF MIRANDA RIGHTS

Defendant contends the trial court erred in denying his motion in limine to exclude his statements made after law enforcement officers reinitiated questioning, even though defendant had previously asserted his constitutional rights to remain silent and to counsel.

In considering defendant's contention, we turn to *Miranda v. Arizona* (1966) 384 U.S. 436, *Edwards v. Arizona* (1981) 451 U.S. 477, and related subsequent case law. In *Miranda*, the Supreme Court held that certain warnings must be given before a suspect's statement made during custodial interrogation can be admitted into evidence, in order to protect the privilege against self-incrimination. In *Edwards*, the United States Supreme Court held: "'an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" [Citation.] . . . In the event he does in fact 'initiate' dialogue, the police may commence interrogation if he validly waives his [*Miranda*] rights. [Citations.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 648-649, quoting *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1046.)

Defendant argued in his motion in limine that all of his statements made to law enforcement on May 1, 2010, were inadmissible because he was in continuous custody, including after he was released to his parents' custody for a week. Defendant asserts that, since he did not initiate further communication with the police after initially invoking his rights to silence and an attorney, the police-initiated interrogation on May 1, 2010, violated his *Miranda* rights. We disagree.

Here, it is undisputed that defendant was advised of all of his rights when taken into custody on April 26, 2010, and he invoked his rights to remain silent and to an attorney. It is also undisputed that Collopy ceased questioning defendant at that time. On May 1, 2010, the police took defendant back into custody and Collopy asked defendant if he remembered his *Miranda* rights the week before. Defendant said he remembered his rights and agreed to talk to Detective Flores (unrelated to defendant). Defendant made incriminating statements, including admitting he was present at the Ranch Market and identifying himself in the Ranch Market surveillance video.

The issue here is whether, after defendant was released from police custody to his parents, the police thereafter could initiate custodial interrogation when defendant was taken back into police custody a week later. Normally, if a suspect invokes his *Miranda* rights and the police, “*in the absence of any break in custody*, initiate a meeting or conversation during which counsel is not present, the suspect's statements are presumed to have been made involuntarily and are inadmissible as substantive evidence at trial, . . .” (*People v. Storm* (2002) 28 Cal.4th 1007, 1021-1022.) In the instant case, there was no *Miranda* violation because there was a “break in custody” when defendant

was released to his parents. Thereafter, upon taking defendant back into custody, the police could lawfully initiate interrogation of defendant after advising him of his *Miranda* rights.

V

TESTIMONY BASED ON PERSONAL KNOWLEDGE

Defendant argues the trial court erred in denying his motion in limine to exclude Madril's testimony under Evidence Code section 702, on the ground his testimony was not based on personal knowledge. Defendant sought to exclude Madril's statements to the police and testimony regarding Madril observing defendant and Quintero at Ranch Market about 30 minutes before the shooting incident.

Under Evidence Code section 702, subdivision (a), a witness must have personal knowledge of the facts to which he testifies. "Personal knowledge" means a "present recollection of an impression derived from the exercise of the witness' own senses." (Cal. Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid. Code (2007 ed.) foll. § 702, p. 300, citing 2 Wigmore, Evidence (3d ed. 1940) § 657, p. 762.) The proponent of the evidence has the burden to establish this requisite foundation. (Evid. Code, § 403, subd. (a)(2).) Whether to exclude testimony under Evidence Code section 702 lies within the discretion of the trial court, whose decision will not be disturbed unless there is a clear abuse of discretion. (*People v. Tatum* (2003) 108 Cal.App.4th 288, 298.)

Defendant argues the trial court should have excluded Madril's testimony because he did not observe the shooting incident and therefore did not have any personal

knowledge about it. All Madril knew was that Hyde called and told him “some Mexicans had shot him” and one of them was wearing a white Raiders jersey. In response, Madril told Hyde he had seen two individuals at Ranch Market shortly before the shooting and one of the individuals was wearing a white Raiders jersey. Madril deduced from Hyde’s description that these two individuals were likely the same individuals Madril had seen at the market before the shooting.

Madril did not testify regarding the shooting. Rather, he testified about observing defendant and Quintero 30 minutes before the shooting, and telling Hyde and the police what he had observed. Madril’s testimony was based on his personal knowledge and observations. The testimony was directly relevant to defendant and Quintero’s activities, appearance, and location shortly before the shooting. It also provided a foundation for relying on the Ranch Market surveillance video for purposes of identification of defendant and Quintero.

VI

MOTION TO SEVER

Defendant contends the trial court abused its discretion in denying his motion in limine to bifurcate and to try separately the street terrorism charge (§ 186.22, subd. (a); count 3), which alleged defendant participated in a criminal street gang and promoted, furthered and assisted in felonious criminal conduct by members of defendant’s gang. Defendant asserted in his motion in limine that it was speculative that the shooting was committed for the benefit of defendant’s gang. Therefore the trial court should sever the

street terrorism charge from the remainder of the case and exclude gang evidence from trial of the attempted murder and battery charges.

Section 954 provides in relevant part that, “if two or more accusatory pleadings are filed” charging “two or more different offenses of the same class of crimes or offenses . . . the court may order them to be consolidated.” (§ 954.) A party seeking severance has the burden of establishing there is a substantial danger of prejudice requiring that charges be tried separately. (*People v. Carter* (2005) 36 Cal.4th 1114, 1153-1154.)

“““The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.””” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315; see also *People v. Carter*, *supra*, 36 Cal.4th at p. 1154.)

“““Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a ‘weak’ case has been joined with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.”” [Citations.]” *People v. Geier* (2007) 41 Cal.4th 555, 575.) “In reviewing this claim, we apply the familiar standard of review providing that the trial court’s ruling may be reversed only if the court has abused its discretion.” (*Bradford*, at p. 1315.)

During oral argument on defendant's motion in limine to bifurcate, the trial court denied defendant's motion because count 3 was an important part of the case. We agree. Because the gang evidence was relevant to motive, it was cross-admissible as to count 1 (attempted premeditated murder charge) and count 3 (street terrorism). Defendant is required to show that a substantial danger of prejudice compelled severance. (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) "A pretrial ruling that was correct when made can be reversed on appeal only if joinder was so grossly unfair as to deny due process. [Citations.]" (*Ibid.*)

Here, joinder of the street terrorism and attempted murder charges was not so grossly unfair since the gang evidence was cross-admissible. "Cross-admissibility is the crucial factor affecting prejudice. [Citation.] If evidence of one crime would be admissible in a separate trial of the other crime, prejudice is usually dispelled." (*People v. Stitely, supra*, 35 Cal.4th at p. 531.) Since the gang evidence would have been admissible as to both charges for attempted murder and street terrorism, there was no prejudice in trying both charges together. In addition, the evidence of the street terrorism charge was not significantly weaker than the evidence of the other charges "so as to create the danger of a 'spillover' effect that occurs when 'weaker charges [are] joined with strong charges so that the effect of the aggregate evidence might alter the outcome of the trial.' [Citation.]" (*People v. Geier, supra*, 41 Cal.4th at p. 576.)

We conclude the trial court did not abuse its discretion in denying defendant's motion to bifurcate. Defendant has failed to demonstrate an abuse of discretion or gross unfairness in trying the charges together. (*People v. Stitely, supra*, 35 Cal.4th at p. 531.)

VII

PROSECUTORIAL MISCONDUCT

Defendant contends the prosecutor committed several instances of misconduct during closing argument, including committing *Griffin*² error and making disparaging remarks about defendant's attorney.

A. Applicable Law

In order to prove prosecutorial misconduct, defendant must establish that the prosecution's behavior at trial went below the standard of behavior for prosecutors. ““““A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.””” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.””” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *People v. Earp* (1999) 20 Cal.4th 826, 858.) The prosecution may generally be given wide latitude in argument, so long as the argument ““““amounts to fair comment on the evidence,”””” (*Hill*, at p. 819.) Prosecutors also have ““““broad discretion to state [their] views as to what the evidence shows”””” (*People v. Welch* (1999) 20 Cal.4th 701, 752.) However, prosecutors are held to a high standard at trial “because of the unique function he or she performs in

² *Griffin v. California* (1965) 380 U.S. 609, 613-615.

representing the interests, and in exercising the sovereign power, of the state. [Citation.]” (*Hill*, at p. 820.)

As a general rule, “to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm.” (*People v. Frye* (1998) 18 Cal.4th 894, 969.) However, an objection need not be made if an admonition would not have cured the harm caused by the misconduct. (*People v. Bradford, supra*, 15 Cal.4th at p. 1333.)

B. Griffin Error

Defendant contends the prosecutor’s following statements, made during closing argument, constitute prejudicial *Griffin* error:

1. “[M]an, even your own family didn’t come in to corroborate [your] statement?”
2. “What evidence did we hear about the defendant moving on with his life, getting good grades?”

Defendant complains that these two statements constituted *Griffin* error because the prosecutor indirectly commented on defendant’s failure to present evidence, thereby shifting the burden of proof to the defense. *Griffin* forbids prosecution comment on a defendant’s failure to testify in his own behalf; the case does not, however, forbid all comment “upon the failure of the defense to introduce material evidence or to call anticipated witnesses.” (*People v. Bradford, supra*, 15 Cal.4th at p. 1339.) Defendant argues that the two statements improperly implied that defendant had the burden of producing evidence proving defendant’s innocence.

We conclude neither statement constitutes prejudicial *Griffin* error. The prosecutor was merely arguing the state of the evidence. It is unlikely the jury construed the remarks as suggesting defendant had the burden of proving his innocence, particularly since, right after making the two statements, the prosecutor told the jury the prosecution had the burden of proving defendant's guilt: "It's not [defendant's] burden to prove he is innocent. It is my burden to prove he is guilty, but, man, even your own family didn't come in to corroborate [your] statement?"

Even if the statements were inappropriate, they did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process" (People v. *Earp*, supra, 20 Cal.4th at p. 858), and did not constitute deceptive or reprehensible methods to attempt to persuade the jury to find defendant guilty. (People v. *Wallace* (2008) 44 Cal.4th 1032, 1070.)

Furthermore, defense counsel did not request an admonition as to the first statement and did not even object to the second statement in the trial court. An admonition would have avoided any possibility of the jury construing the statements as suggesting defendant had the burden of producing evidence of innocence. (People v. *Earp*, supra, 20 Cal.4th at p. 858.) Because any harm could have been cured by an admonition, defendant's failure to make a timely objection and ask the court to admonish the jury precludes him from now challenging the prosecutor's comments.

C. Disparagement of Defense Counsel

Defendant contends the prosecutor's following remarks made during rebuttal constituted prosecutorial misconduct because they denigrated defense counsel and called into question his veracity:

1. "Defense was trying to mislead you."
2. "[W]hy does defense try and mislead you?"
3. "[D]efense was misleading you."
4. "Defense misled you there again."

Defendant argues these statements suggested that defense counsel was attempting to deceive the jury and thus cast doubt on defense counsel's credibility. Defendant did not object to these statements or request an admonition. Defendant, however, asserts that an admonition would have been futile.

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill, supra*, 17 Cal.4th at p. 832.) Here, the conduct which defendant challenges involves statements by the prosecutor that defense counsel misled the jury. Because the claim of prosecutorial misconduct was not raised in the trial court, defendant forfeited his objection. (*People v. Frye, supra*, 18 Cal.4th at p. 970; *People v. Hardy* (1992) 2 Cal.4th 86, 171.)

Furthermore, even assuming the statements constitute misconduct, an admonition would have cured any harm or prejudice. "[T]he record fails to disclose grounds for applying any exception to the general rule requiring both an objection and a request for a curative instruction. [Citations.] Accordingly, defendant's claim of prosecutorial

misconduct is barred in its entirety.” (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

Because any harm could have been cured by an admonition, defendant’s failure to make a timely objection and ask the court to admonish the jury precludes him from now challenging as misconduct comments by the prosecutor that defendant cites as prosecutorial misconduct.

In any event, we discern no prejudicial misconduct by the prosecutor in this case. (*People v. Earp, supra*, 20 Cal.4th at pp. 858-859.) The trial court instructed the jury to follow the law as given to them in the instructions. In addition, the court instructed the jurors that what the attorneys said was not evidence and that, in case of conflicts, they must follow the law as given by the court. It is presumed they followed these instructions, regardless of the prosecutor’s comments that defense counsel had misled the jury or was attempting to do so. (*People v. Frank* (1990) 51 Cal.3d 718, 728; *People v. Bryden* (1998) 63 Cal.App.4th 159, 184.)

VIII

CUMULATIVE ERROR

Defendant argues that the cumulative impact of the foregoing alleged trial errors discussed above created a reasonable probability that, but for the errors, the jury would have reached a verdict more favorable to defendant.

Reversal based on cumulative error is required only if a high number of instances of error occurring at trial create a strong possibility that “the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone.” (*People v. Hill, supra*, 17 Cal.4th at p. 845.) For instance, in *People v. Hill, supra*, 17

Cal.4th at pages 844-847, the court concluded that the cumulative impact of constant and outrageous misconduct by the prosecutor and several legal errors occurring at trial, “created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.” (*Id.* at p. 847.)

Inasmuch as we have rejected each and every claim of error individually, we find no cumulative error sufficient to have affected the outcome of the trial to defendant’s detriment.

IX

SUFFICIENCY OF EVIDENCE OF ATTEMPTED PREMEDITATED MURDER

Defendant contends there was insufficient evidence to support his convictions for attempted premeditated murder, battery causing serious bodily injury, and street terrorism. We conclude there was substantial evidence supporting each of defendant’s convictions.

“In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) ““Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141, disapproved of other grounds in *People*

v. Rundle (2008) 43 Cal.4th 76, 151.) “Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*Young*, at p. 1181.) “Our role is to determine the legal sufficiency of the found facts and not to second guess the reasoning or wisdom of the fact finder.” (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.) The same standard applies when the conviction rests primarily on circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

A. Attempted Premeditated Murder

Defendant argues there was insufficient evidence of premeditated murder because the identification evidence was weak and Quintero’s testimony was inconsistent with his prior statements made to the police. Also, the firearm and shell casings were not found, and defendant’s fingerprints were not found on the gun case. In addition, defendant argues there was no evidence of any relationship between Hyde and defendant, showing defendant had a specific intent to shoot Hyde.

The prosecution had the burden of proving each element of attempted premeditated murder. The prosecution met its burden. “Murder” is defined in section 187, subdivision (a) as “the unlawful killing of a human being, or a fetus, with malice aforethought.” The requisite malice, or intent, may be express or implied. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Attempted murder, however, requires express malice, i.e., the specific intent to kill a fellow human being and a direct but ineffectual act toward committing the killing. (*Ibid.*; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) It is well settled that malice, or intent to kill, may be inferred from a defendant’s actions

and other circumstances surrounding the crime. (*Smith*, at p. 741.) If a defendant purposely uses a lethal weapon with lethal force against a victim, such circumstances give rise to an inference of an intent to kill. (*Id.* at p. 742.)

Here, there was substantial evidence of each of the elements of attempted murder. There was evidence that, when defendant noticed Hyde walking down the street in defendant's gang's turf, defendant told Guerrero to stop the car. Defendant and Quintero, a fellow gang member, got out of the car. Defendant quickly approached Hyde from behind, cocked his gun, aimed at defendant, and intentionally fired three times at Hyde, hitting Hyde in the foot as Hyde ran away. Quintero testified that Hyde was dressed in clothing gang members wear and defendant wanted to find out who he was. When interviewed by police detectives, Quintero said that defendant shot Hyde because he thought Hyde had previously shot at defendant. Hyde identified defendant as the shooter in a photographic lineup and at trial. This evidence was more than sufficient evidence to support defendant's attempted murder conviction.

B. Battery Causing Serious Bodily Injury

Defendant challenges the sufficiency of evidence supporting his conviction for committing battery causing serious bodily injury (§ 243, subd. (d); count 2). Defendant argues there was insufficient evidence defendant was the shooter and seriously injured Hyde.

A battery inflicting serious bodily injury occurs “[w]hen a battery is committed against any person and serious bodily injury is inflicted on the person, . . .” (§ 243, subd. (d).) As a general rule, “the defendant’s act must be the legally responsible cause

(“proximate cause”) of the injury, death or other harm which constitutes the crime.’
[Citation.]” (*People v. Schmies* (1996) 44 Cal.App.4th 38, 47, italics omitted, quoting
1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Elements of Crime, § 126, pp. 145-
146.) Given this court’s limited role on appeal, defendant bears an enormous burden in
claiming there was insufficient evidence to sustain his conviction. “““If the
circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing
court that the circumstances might also be reasonably reconciled with a contrary finding
does not warrant a reversal of the judgment.””” (*People v. Bean* (1988) 46 Cal.3d 919,
932-933.)

Here, there was evidence Hyde identified defendant as the shooter in a
photographic lineup and at trial. The testimony of a single witness is sufficient to uphold
a judgment, even if it is inconsistent or contradicted by other evidence. (*People v. Scott*
(1978) 21 Cal.3d 284, 296; see also *People v. Boyer* (2006) 38 Cal.4th 412, 480
[“Identification . . . by a single eyewitness may be sufficient to prove the defendant’s
identity as the perpetrator of a crime.”].) Only if a witness’s testimony is physically
impossible or inherently improbable may it be discounted by the reviewing court. (*Scott*,
at p. 296.) Defendant has not established that Hyde’s identification testimony was either
physically impossible or inherently improbable. There also was substantial evidence
defendant seriously injured and shot Hyde in the foot. Hyde left a trail of blood as he
fled from defendant and was treated in the hospital for his injury. The evidence was
therefore sufficient to support defendant’s battery conviction.

C. Street Terrorism

Defendant contends there was insufficient evidence supporting his conviction for street terrorism (§ 186.22, subd. (a); count 3). We disagree.

Street terrorism has three elements: 1) defendant's active gang participation that is more than nominal or passive; 2) defendant's knowledge of a pattern of criminal gang activity; and 3) defendant willfully promoting, furthering, or assisting felonious gang conduct. (§ 186.22, subd. (a); *People v. Lamas* (2007) 42 Cal.4th 516, 523.) Defendant argues there was insufficient evidence he was an active gang member and committed the shooting for the benefit of the Hillside Riva gang.

Gang evidence presented at trial included letters from gang members found in defendant's cell, written to defendant in September 2010, while he was in custody. There was also a picture of defendant with a tattoo on his collar bone, saying, "Inland Empire." Detective Collopy, who testified as a gang expert, stated that the tattoo was a form of gang insignia, used by the Hillside Riva gang, as well as other gangs. Collopy also testified that the charged shooting offense occurred in Hillside Riva gang territory, and defendant's companion, Quintero, was an active Hillside Riva gang member, as was defendant. Quintero socialized with defendant every day. Defendant had also been in contact with other Hillside Riva gang members and associates.

Collopy further testified that, during a police investigation of defendant's home, which was located in Hillside Riva gang territory, a police detective found a photograph of defendant flashing a gang sign. "Hillside Rivas" was imprinted at the top of the photo. Collopy concluded that defendant's Hillside Riva gang benefited from defendant

shooting Hyde because defendant was defending his gang's territory and this increased defendant and Quintero's respect by their gang. Also, the shooting created fear of their gang within the community and the gang thrived on intimidating people and causing others to fear their gang and its members. Additionally, Quintero testified that defendant had told him he shot Hyde in retaliation for Hyde shooting at defendant.

This evidence was more than sufficient to support defendant's street terrorism conviction. The evidence established that (1) defendant actively participated in the Hillside Rivas gang at the time of the charged offense, (2) defendant was well aware of his own gang's pattern of criminal gang activity, and (3) defendant willfully promoted, furthered, or assisted felonious gang conduct by shooting Hyde. (§ 186.22, subd. (a); *People v. Lamas, supra*, 42 Cal.4th at p. 523.)

X

GREAT BODILY INJURY ENHANCEMENT

Defendant challenges the section 12022.53, subdivision (d) enhancement on the ground there was insufficient evidence of great bodily injury (GBI). Defendant argues that Hyde's bullet injury was minor and therefore did not constitute GBI, since the injury did not require any stitches and Hyde was released from the hospital the same evening. We do not find this argument persuasive.

An enhancement under section 12022.53, subdivision (d) requires GBI, "as defined in Section 12022.7." Section 12022.7, subdivision (f) defines GBI as "a significant or substantial physical injury." In *People v. Escobar* (1992) 3 Cal.4th 740, the California Supreme Court noted that the definition of "great bodily injury" within the

meaning of section 12022.7 does not require “‘permanent,’ ‘prolonged’ or ‘protracted’ disfigurement, impairment, or loss of bodily function.” (*Escobar*, at p. 750.) Injuries such as “multiple contusions and swelling of [the] hands, arms and buttocks,” “multiple abrasions and lacerations to the victim’s back and bruising of the eye and cheek,” and a “swollen jaw, bruises to head and neck and sore ribs” all are sufficient. (*Id.* at p. 752.) Under *Escobar*, Hyde’s injury, in which a bullet passed through his foot, causing a trail of blood as he fled, would qualify as GBI under the section 12022.53, subdivision (d).

Defendant also argues the trial court abused its discretion by denying his motion to strike the enhancement, since defendant did not have any criminal history and had a strong familial background. But under section 12022.53, subdivision (h), “Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section [12022.53] or a finding bringing a person within the provisions of this section.” The trial court did not have authority to strike the section 12022.53 enhancement based on defendant’s lack of criminal history and his familial background.

XI

MOTION FOR NEW TRIAL

Defendant contends the trial court erred in denying his motion for new trial, which was based on his claims of prosecutorial misconduct and insufficient evidence (§ 1181, subd. (b)(5) and (6)), as addressed in this opinion above. Defendants asserted in his motion for new trial that the prosecutor committed misconduct by making negative remarks about defense counsel, inappropriately commenting on defendant’s failure to

produce certain evidence, and incorrectly inferring that defendant had the burden of producing evidence of his innocence. Defendant also argued in his motion that there was insufficient evidence supporting each of the convictions. Specifically, defendant argues there was insufficient evidence establishing identification of defendant as the perpetrator.

It has long been settled that the trial court has broad discretion in ruling on a new trial motion, and there is a strong presumption that it properly exercised that discretion. ““The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.”” (*People v. Williams* (1988) 45 Cal.3d 1268, 1318; *People v. Andrade* (2000) 79 Cal.App.4th, 651, 659.)

Section 1181 provides various statutory grounds for bringing a motion for new trial, including subdivisions (5) and (6), which provide in relevant part: “When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 5. . . . when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury; [¶] 6. When the verdict or finding is contrary to law or evidence, . . .”

Defendant’s motion for new trial is based on the same arguments already raised and rejected in this appeal, regarding prosecutor misconduct and insufficient evidence. Because, as discussed above in this opinion, these claims are devoid of merit, we likewise conclude the trial court did not abuse its discretion in denying defendant’s motion for new trial.

XII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.